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# Synopsis

## Recent Developments in the Law of the Sea 1980-1981

*This Synopsis highlights major developments occurring between December 1980 and December 1981 in the law of the sea. It concentrates on the two meetings of the tenth session of the Third United Nations Conference on the Law of the Sea (UNCLOS III). It also discusses significant events that occurred outside the UNCLOS III.<sup>1</sup>*

### THE TENTH SESSION OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA

#### *Introduction*

The Ninth Session of UNCLOS III<sup>2</sup> offered hope for the conclusion of negotiations and the ratification of an international Con-

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1. The primary sources used to compile this Synopsis include United Nations documents, United Nations press releases, *The United Nations Monthly Chronicle*, *International Legal Materials*, *The United States Department of State Bulletin*, Department of State internal documents, *United States Code Congressional and Administrative News*, *Marine Policy*, the *New York Times*, *Worldwide Reports*, *Law of the Sea*, the *London Times*, the *Los Angeles Times*, and the *San Diego Union*.

2. For a detailed discussion of the Eighth session, see Synopsis, *Recent Developments in the Law of the Sea 1978-1979*, 17 SAN DIEGO L. REV. 691 (1980) [hereinafter cited as *Recent Developments 1978-1979*]. For additional background see Oxman, *The Third United Nations Conference on the Law of the Sea: The Ninth Session*, 75 AM. J. INT'L L. 211 (1981) [hereinafter cited as *Oxman Ninth Session*].

vention on the Law of the Sea.<sup>3</sup>

Developments at the Tenth Session dashed these hopes and left the future law of the sea uncertain. A participant in negotiations since 1974, the United States decided to reevaluate its position.<sup>4</sup> Over 150 national delegations were routinely preparing for the New York meeting of the Tenth Session of UNCLOS III when the United States announced:<sup>5</sup>

After consultation with the other interested departments and agencies of the United States government, the Secretary of State has instructed our representative to the United Nations Law of the Sea Conference to seek to ensure that the negotiations do not end at the present session of the conference pending a policy review by the United States Government. The interested departments and agencies have begun studies of the serious problems raised by the draft convention and these will be the subject of a thorough review which will determine our position towards the negotiations.

Since this release the United States has neither participated in formal negotiations nor declared its new policy. Although the United States attended both the March meeting in New York and the August meeting in Geneva, it merely "observed" events and occasionally expressed its views about provisions in the treaty.<sup>6</sup>

Despite this new atmosphere of uncertain commitment, the Tenth Session retained the structure of previous sessions.<sup>7</sup> At the New York meeting, the Conference elected Tommy T.B. Koh of Singapore as the new president.<sup>8</sup> He replaced H. Shirley Amer-

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3. A Draft Convention Informal Text was produced. See Draft Convention, U.N. Doc. A/Conf.62/L.98/Rev. 4 (1981).

4. Edmonson & Green, *Preface*, 5 MARINE POL'Y 171 (1981).

5. United States Press Release (March 2, 1981) (posted at the United States Department of State).

6. The Administration wants changes in the draft of a projected charter on man's use of the sea. It has not declared a policy. *N.Y. Times*, Aug. 16, 1981, § 1, at 11, col. 1. "The sudden reversal of U.S. law of the sea policy on 2 March 1981, followed by the dismissal of top delegation personnel five days later, took foreign delegates by surprise. . . ." Kimball, *Update—the Tenth Session*, 5 MARINE POL'Y 287, 288 (1981).

7. It consisted of three main committees. Committee I dealt with management and control of deep seabed resources in areas beyond national jurisdiction. Committee II covered jurisdictional issues within the territorial sea, the 200-mile exclusive economic zone, the continental shelf, and the high seas. Committee III developed regimes regulating marine pollution and scientific research. On several occasions the Conference met in Informal Plenary. See Synopsis, *Recent Developments in the Law of the Sea: 1977-1978*, 16 SAN DIEGO L. REV. 705, 707-13 (1979). The Third Conference on the Law of the Sea (UNCLOS) opened in 1974. Since then sessions have been held annually. UNCLOS is the longest and largest plenary Conference ever convened. At the last meeting of the Tenth Session, 153 states participated in negotiations. For a history of the Conference see U.N. Dep't of Pub. Information, Press Release SEA/376, at 28 (Feb. 27, 1980).

8. Speaking as the newly elected President on March 13, Mr. Koh paid tribute to the memory of the late President. He said his strong leadership had brought the Conference to agree on more than 300 articles of the Draft Convention and eight annexes, without resorting to voting. U.N. MONTHLY CHRON., May, 1981, at 12.

isanghe, of Sri Lanka, who had served as Conference President since the beginning of the Conference in 1973. The agenda of the meeting dealt with issues identified at the end of the Ninth Session as still outstanding.<sup>9</sup> These issues were: the question of delimitation of maritime boundaries between nations with opposite or adjacent coasts,<sup>10</sup> the preparatory commission of the deep seabed,<sup>11</sup> the participation clause,<sup>12</sup> and the protection of preparatory investments.<sup>13</sup> Without United States' participation, many nations refused to negotiate issues and little progress was made.<sup>14</sup>

The resumed Tenth Session in Geneva continued discussion of the same issues.<sup>15</sup> By the end of the session, only the delimitation of boundaries question had been resolved.<sup>16</sup> The Conference decided to issue a new text of the Draft Convention, incorporating changes made by the Drafting Committee.<sup>17</sup> The words *informal*

9. The recommendations of the agenda by the collegium, to the General Assembly were made based upon U.N. Doc. A/Conf.62/BUR.13/Rev. 1 (1980). The collegium consists of the President of the Conference, the chairmen of the three main committees, the Rapporteur General, and the chairman of the Drafting Committee.

10. "The collegium took note of the fact that the two interest groups, led respectively by Iceland and Spain, on the question of delimitation of maritime boundaries between states with opposite or adjacent coasts, would like to meet during this session to continue their consultations." U.N. Doc. A/Conf.62/110 (1981).

11. During an interim period, the Preparatory Commission would be charged with receiving State sponsored mining applications, granting priorities to sites requested, and banking reserved sites for use by the Enterprise or by developing countries. U.N. Dep't of Pub. Information, Press Release SEA/148 (Aug. 27, 1981).

12. A participation clause deals with who is eligible to participate in the treaty. The basic question is which entity exercised competence with respect to Law of the Sea matters and can be held legally and financially responsible. U.N. MONTHLY CHRON., May, 1981, at 12.

13. This concerns the treatment to be accorded to the preparatory investments made before the Convention enters into force. The Chairman of the First Committee informed the collegium that in view of the uncertain attitude of the United States delegation towards the Draft Convention in general, and towards Part XI in particular, the Group of 77 has informed him that it is not prepared to negotiate the question until the attitude of the United States delegation towards Part XI is clarified. The Group of 77 is a bloc of approximately 110 underdeveloped countries.

14. Kimball, *Update—The Tenth Session*, 5 MARINE POL'Y 287, 288 (1981).

15. U.N. Doc. A/Conf.62/BUR/SR.64 (prov. ed. 1981). The agenda at the resumed Tenth Session was not different from that of the New York meeting.

16. San Diego Union, Aug. 29, 1981, § A, at 12, col. 2.

17. The Informal Composite Negotiating Text, Revision I, II, III (which is called Draft Convention Informal Text) constitutes the basic negotiating document for the Draft Treaty. See Synopsis, *Recent Developments in the Law of the Sea 1979-1980*, 18 SAN DIEGO L. REV. 535, 536 n.7 (1981).

*text* are removed, meaning this text is now considered the formal text.<sup>18</sup> The Conference chose Jamaica as the site for the projected International Seabed Authority<sup>19</sup> and Hamburg, West Germany for the location of the Sea Tribunal.<sup>20</sup> The Tenth Session adjourned with the expectation of completing all formal work on the Convention at the New York meeting scheduled for March 1982.<sup>21</sup>

### *The New York Meeting, March 9-April 24, 1981*

#### The United States Position

The United States' decision to reevaluate its position toward the Draft Convention took the meeting by surprise.<sup>22</sup> The Reagan administration felt that it was "better to face criticism" in the United Nations for its decision to review the Law of the Sea Treaty than to conclude a treaty which failed to adequately advance United States' interests.<sup>23</sup> While no one disputed the United States' claim that it had a right to review the treaty before signing it,<sup>24</sup> the timing and the possibility of renewed discussion that might unravel previously negotiated provisions led to criticisms.<sup>25</sup>

The United States' opposition focuses on the deep seabed mining issue. First, the United States criticizes specific provisions in the treaty that impact on the interests of private groups. Second, the United States opposes the principle of an international regime governing seabed mineral development. Fundamental to the latter objection is the Convention's position that the ocean's riches beyond the 200 mile territorial limit are the "common heritage of mankind."<sup>26</sup> Some opponents argue that this position interferes

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18. U.N. Dep't of Pub. Information, Press Release SEA/146, at 1 (Aug. 24, 1980) [hereinafter cited as SEA/146].

19. San Diego Union, Aug. 29, 1981, § A, at 12, col. 2.

20. *Id.*

21. *Id.*

22. See The United States and the Law of the Sea: A Review of the Issues, at 1, col. 1 (United Nations Association of the United States Educational Supplement) (on file with the author) [hereinafter cited as The United States and the Law of the Sea].

23. Soundings, Law of the Sea News and Comment, June-July 1981, at 1 [hereinafter referred to as Soundings, June-July 1981].

24. The United States and the Law of the Sea, *supra* note 22, at 1, col. 1. Some delegates felt that a review would call for substantial revisions of the text.

25. *Id.*

26. *Id.* at 2, col. 3. Ambassador Pardo of Malta awakened the U.N. General Assembly to the concept. A U.N. declaration gave the concept its final form. "The sea-bed and the ocean floor . . . beyond the limits of national jurisdiction . . . are the common heritage of mankind . . . and no State shall claim or exercise sovereignty or sovereign rights over any part thereof."

with the free enterprise system.<sup>27</sup> The draft treaty is further criticized by these opponents as a giveaway to the Third World.<sup>28</sup>

The United States concerns were first spelled out when Ambassador James L. Malone testified before a subcommittee of the Senate Foreign Relations Committee.<sup>29</sup> He identified the following critical problems:

The Draft Convention places under burdensome international regulation the development of all of the resources of the seabed and subsoil beyond the limits of national jurisdiction, representing approximately two-thirds of the earth's submerged lands.<sup>30</sup> These resources include polymetallic nodules. They also include mineral deposits beneath the surface of the seabed about which nothing is known today, but which may be of very substantial economic importance in the future.

The Draft Convention would establish a supranational mining company, called the Enterprise, which would benefit from significant discriminatory advantages relative to the companies of industrialized countries.<sup>31</sup> Arguably, it could eventually monopolize production of seabed minerals. Moreover, the Draft Convention requires the U.S. and other nations to fund the initial capitalization of the Enterprise, in proportion to their contributions to the U.N.<sup>32</sup>

Through its transfer of technology provisions, the Draft Convention compels the sale of proprietary information and technology now largely in U.S. hands. Under the Draft Convention, with certain restrictions, the Enterprise, through mandatory transfer, is guaranteed access on request to the seabed mining technology owned by private companies and also technology used by them but owned by others. The text further guarantees similar access to privately-owned technology by any developing country planning to go into seabed mining. We must also carefully consider how such provisions relate to security-related technology.<sup>33</sup>

The Draft Convention limits the annual production of manganese nodules from the deep seabed, as well as the amount which any company

27. "One thing wrong with 'common heritage' is that it destroys the idea of private property and the incentive to risk money to explore and develop. Who wants to invest in a company sharing the seabed with a collectivist combine, and subject to the regulation of the 'Authority'?" Saffire, *The Great Ripoff*, reprinted in United States and the Law of the Sea, *supra* note 22, at 1, col. 1.

28. *Id.* at 2, col. 3. "This treaty as it stands is an ideological surrender to third world demands for a 'new world economic order'."

29. James L. Malone, testimony before the Subcomm. on Oceanography, Comm. on Merchant Marine and Fisheries, U.S. House of Representatives (Apr. 28, 1981) (copy circulated by the Dept. of State).

30. See Draft Convention, *supra* note 3, art. 157, para. 1.

31. The Enterprise is the organ of the International Seabed Authority that would conduct deep seabed mining. Draft Convention, *supra* note 3, art. 170, para. 1.

32. Speech by Tommy T.B. Koh, Should the United States Ratify the New Law of the Sea Treaty? (June 4, 1980) (for J. Seward Johnson Lectures in Marine Policy) [hereinafter cited as Tommy T.B. Koh]. See Draft Convention, *supra* note 3, art. 160, para. 2(e).

33. Draft Convention, *supra* note 3, Annex III, art. 5.

can mine for the first twenty years of production.<sup>34</sup> The stated purpose of these controls is to avoid damaging the economy of any country which produces the same commodities on land. In short, it attempts to insulate land-based producers from competition with seabed mining. In doing so the draft treaty could discourage potential investors, thereby creating artificial scarcities. In allocating seabed production, the International Seabed Authority is granted substantial discretion to select among competing applicants. Such discretion could be used to deny contracts to qualified American companies.

- The Draft Convention creates a one-nation one-vote international organization which is governed by an Assembly<sup>35</sup> and a 36 member Executive Council. In the Council, the Soviet Union and its allies have three guaranteed seats, but the U.S. must compete with its allies for any representation. The Assembly is characterized as the “supreme” organ and the specific policy decisions of the Council must conform to the general policies of the Assembly.
- The Draft Convention provides that, after fifteen years of production, the provisions of the treaty will be reviewed to determine whether it has fulfilled overriding policy considerations, such as protection of land-based producers, promotion of Enterprise operations and equitable distribution of mining rights. If two-thirds of the States Parties to the treaty wish to amend provisions concerning the system of exploitation, they may do so after five years of negotiation and after ratification by two thirds of the States Parties. If the U.S. were to disagree with duly ratified changes, it would be bound by them nevertheless, unless it exercised its option to denounce the entire treaty.<sup>36</sup>
- The Draft Convention imposes revenue sharing obligations on seabed mining corporations which would significantly increase the costs of seabed mining.<sup>37</sup>
- The Draft Convention imposes an international revenue sharing obligation on the production of hydrocarbons from the continental shelf beyond the 200 mile limit. Developing countries that are net-importers of hydrocarbons are exempt from the obligation.
- The Draft Convention contains provisions concerning liberation movements, like the PLO, and their eligibility to obtain a share of the revenues of the Seabed Authority.
- The Draft Convention lacks any provisions for protecting investments made prior to entry into force of the Convention.<sup>38</sup> (Author’s footnotes)

The United States’ new belief that the availability of natural resources is essential to its national security has also contributed to the decision to reconsider the Draft Convention. Previously, the United States primary security concern in the law of the sea area was the freedom of seas for innocent passage. The emphasis now has shifted to protection of United States’ access to and interests in ocean resources.

Criticisms of the United States announcement to review the UNCLOS III Draft Convention have been advanced throughout the world. In Moscow, *Tass* reported that the United States had

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34. *Id.*, art. 151, para. 2(a).

35. *Id.*, art. 161.

36. *Id.*, art. 155, paras. 1, 4. This could be against the provisions of the United States Constitution. *See, e.g.*, U.S. CONST. art. II, § 2.

37. Draft Convention, *supra* note 3, art. 170, para. 4.

38. The United States did not negotiate at the Tenth Session, so the other nations refused to negotiate on this vital issue.

demonstrated its inconsistency and unreliability as a partner in international negotiations.<sup>39</sup> The Bulgaria delegate said the United States had abandoned obligations already assumed.<sup>40</sup> *Pravda* reported that the Law of the Sea treaty would not be acceded to by the United States unless it insured United States' mineral rights.<sup>41</sup> While these criticisms have come mainly from Communist block countries and the Third World, our allies have also been upset. Nonetheless, our allies believe that a treaty without the support of the United States would be useless.<sup>42</sup>

### *Drafting Committee*

The Drafting Committee met during the seven weeks before the spring meeting and then daily throughout the session.<sup>43</sup> The committee is undertaking an article by article textual review of the Draft Convention to achieve the requisite harmonization, concordance, and consistency in the six language versions.<sup>44</sup> At this New York meeting delegates put much of their energy into this area.<sup>45</sup> During the meeting, the language groups and the Informal Plenary met daily. A number of recommendations on the subject matter of Committees II and III were approved.<sup>46</sup> Others are still pending.<sup>47</sup>

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39. Tass (Moscow), Mar. 5, 1981, *reprinted in* 145 WORLDWIDE REPORT, LAW OF THE SEA 1 (1981).

40. BTA (Sofia), Mar. 5, 1981, *translated and reprinted in* 145 WORLDWIDE REPORTS, LAW OF THE SEA 10 (1981).

41. *Pravda* (Moscow), *translated and reprinted in* 145 WORLDWIDE REPORTS, LAW OF THE SEA 10 (1981).

42. San Diego Union, Aug. 29, 1981, § A, at 12, col. 1. Western countries were trying to bridge the gap between the United States and the rest of the world on the treaty. Financial Times (London), Aug. 11, 1981, *reprinted in* WORLD OPINION, No. 25, Aug. 11, 1981 (service of Public Affairs Office, U.S. Mission, Geneva) [hereinafter cited as WORLD OPINION].

43. U.N. MONTHLY CHRON. May, 1981, at 13.

44. Oxman, *Ninth Session*, *supra* note 2, at 255. The situation might yield a rule for interpreting this large and complex convention as suggested lightheartedly by one participant. "The use of the same terms in different places does not necessarily indicate that the same meaning is intended: the use of different terms in different places does not necessarily indicate that a different meaning is intended."

45. Soundings, Law of the Sea News and Comment, April-May, 1981, at 6.

46. *Id.*

47. *Id.* Yet to be concluded is the work on the seabed mining portions of the text and those in dispute settlement, general provisions, final clauses, the preamble and the definition of terms.



## *Committee I*

The chairman of Committee I, Paul Engo, and President Tommy Koh both conducted debate on the plans for a Preparatory Commission.<sup>48</sup> This Commission will lay the groundwork for the International Authority and the International Tribunal. Regulation of the development of the resources of the seabed and subsoil beyond the limits of national jurisdictions will be controlled by these groups.<sup>49</sup> There was general agreement that the Commission should be established by a General Assembly Resolution. Furthermore, there was broad recognition of the Commission's objective to make provisional arrangements for the first session of the Assembly of the International Seabed Authority and its Council.

There was disagreement on membership requirements for the Preparatory Commission. Some countries said it should be open to all who signed the Final Act in the General Assembly while others felt it should include only those who demonstrated an intention to be bound by the Draft Convention. Proponents of this latter view felt this would encourage early commitment to the treaty and prevent participation in the Commission by states which might not adhere to the Draft Convention.<sup>50</sup> Committee I was able to agree on a voting procedure. Some nations insisted on consensus and others favored an approach in which failure to achieve consensus would be followed by voting. Because it was mandated to be an interim body, there was general agreement that the Commission's life should not be unduly long.<sup>51</sup> All sides agreed on having the United Nations provide initial funds for the Commission, but some saw legal and practical difficulties arising from this type of loan.<sup>52</sup>

The First Committee also discussed a report by the Secretary General on some of the effects of the Draft Convention's provisions for limiting seabed mineral production.<sup>53</sup> The report—"Effects of the Production Limitation Formula Under Certain Specified Assumptions"—was requested by the Conference last August on the proposal of the Philippines. The production limita-

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48. Reporting to the Conference at its plenary meeting, Committee Chairman Paul Engo said its work had proceeded under a cloud following the U.S. decision to review the text. U.N. MONTHLY CHRON., May, 1981, at 19.

49. Draft Convention, *supra* note 3, art. 157; *id.* Annex IV, art. 1.

50. See Kimball, *Update—the Tenth Session*, 5 MARINE POL'Y 287, 289 (1981).

51. *Id.*

52. *Id.*

53. *Id.* The first study will be discussed in further detail at the resumed session, along with a final topic: that of prohibiting resort to unfair economic practices such as subsidization of production or marketing of seabed minerals from the international area.

tion formula was aimed at encouraging the production of minerals from the international seabed area while minimizing damage to land-based production of the same minerals. The impact of this provision could be to limit the mining of the deep-seabed. Manganese nodules which are found in the seabed contain nickel, cobalt, manganese and copper.<sup>54</sup> According to one estimate, 1.5 trillion tons of manganese nodules in the seabed await development. The report also summarized all the costs of seabed mineral production, including the cost of the Seabed Authority.<sup>55</sup>

### *Committee II*

The report by the Chairman of this committee, Andres Aquilero (Venezuela), stated that there was a virtual consensus that it would not be desirable to reopen discussion on basic Second Committee issues.<sup>56</sup> All substantive negotiations had been completed. A number of delegations objected to the Chairman's report because it failed to mention prior authorization.<sup>57</sup> Some members are in favor of requiring prior authorization or notification to coastal nations for the passage of warships in the territorial sea. This is opposed to the United States' position of the Right of Innocent Passage.

Because of disagreement about the delimitation of boundaries between adjacent or opposite states, a special negotiating team was set up. It was comprised of two interest groups representing different viewpoints. These two interest groups were led by Ireland and Spain, respectively.<sup>58</sup> The group led by Ireland favored equidistance or median lines in the determination of maritime boundaries between opposite and adjacent nations.<sup>59</sup> The group

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54. Tommy T.B. Koh, *supra* note 32, at 14. Also discussed by Dr. Arvid Pardo in a lecture to the International Law Society, University of San Diego School of Law, November 25, 1981.

55. Administrative costs will range from 41 to 53 million dollars. Building and equipment would cost between 104 and 229 million dollars. Three estimates were given for the initial seabed mining venture: 900 million, 1,000 million, and 1,400 million dollars. U.N. MONTHLY CHRON., May, 1981, at 20-21.

56. *Id.* at 21.

57. A third state has only the right of innocent passage through the territorial seas of another state. See Tommy T.B. Koh, *supra* note 32, at 11. According to Dr. Arvid Pardo, the reason has ceased to be such an important priority for the United States is because of the advent of broad range missiles. See note 54 *supra*.

58. U.N. Doc. A/Conf.62/110 at 2 (1980).

59. See KNIGHT, THE LAW OF THE SEA: CASES, DOCUMENTS, AND READINGS 6-5 (1980), for a discussion of equidistance versus equitable principles. Their con-

led by Spain favored using "equitable principles" to determine these boundaries.<sup>60</sup>

### *Committee III*

Chairman Yankov of Bulgaria reported that substantial negotiations had also been completed on topics assigned to Committee III.

Pakistan introduced a draft resolution on behalf of the Group of 77 aimed at improving the national marine seabed technology and ocean service infrastructure in developing countries.<sup>61</sup> The recommendation requested that all competent United Nations organizations expand programs within their respective fields of competence related to seabed development.<sup>62</sup> Special assistance should be given to developing countries. Furthermore, services should be coordinated on a systemwide basis so that programs will be implemented without disfavoring the coastal, land-locked or otherwise geographically disadvantaged nations.<sup>63</sup>

### *The Geneva Meeting, August 3-August 28, 1981*

Delegates at the resumed Tenth Session in Geneva once again refused to negotiate many issues because the United States did not participate in negotiations. The results of the Tenth Session were incorporated into a fourth revision of the negotiating text, the Draft Convention on the Law of the Sea. The words "Informal Text" were removed.<sup>64</sup> Ambassador James Malone, the Special Representative of the President of the United States for UNCLOS III, presented the United States' position in Informal Plenary.<sup>65</sup>

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cerns were with the continental shelf and delimitation of boundaries. Draft Convention, *supra* note 3, art. 74.

60. *Id.*

61. U.N. MONTHLY CHRON., June, 1981, at 21. The sponsor urged the Conference to act on it at its resumed session in August so the General Assembly could endorse it during its next session beginning in September.

62. *Id.*

63. This group "[r]ecommends that the World Bank, the regional banks, the United Nations Development Programme, the Interim Fund on Science and Technology and other multilateral funding agencies augment and coordinate their operations for the provision of funds to developing countries for the preparation and implementation of major programmes of assistance in strengthening their marine science, technology and ocean sciences." U.N. Doc. A/Conf.62/L.68 (1981). This resolution was revised at the Geneva meeting and issued as U.N. Doc. A/Conf.62/L.79 (1981).

64. U.N. Doc. A/Conf. 62/L.78 (1981).

65. Statement by Ambassador James L. Malone to the Informal Plenary, of the Tenth Session of the Third United Nations Conference on Law of the Sea, Geneva, Aug. 5, 1981 (unpublished copy circulated by the State Department) (on file with the author) [hereinafter cited as statement by James L. Malone, Aug. 5, 1981].

### The United States' Position

Once the United States' review of the law of the sea was started in March, it was undertaken in a deliberate and systematic fashion. The Defense Community, the House and Senate, other nations and the private sector participated in the "thorough" review.<sup>66</sup> Nonetheless, the review was not completed before the August meeting of UNCLOS III.<sup>67</sup> The United States presented its position and tried to assess reactions, but did not negotiate.<sup>68</sup> Mr. Malone had been reluctant to make a broad statement but many delegations requested that a general statement be made.<sup>69</sup> Mr. Malone addressed the delegates at an informal meeting of the Plenary. The United States' reasons for undertaking review were reiterated:

As most of you know, my government undertook its review of the Draft Convention because the people of the United States, through their electoral process, have expressed their preference for a variety of policies that affect the work of the conference. Mr. President, my country's political leaders cannot and should not ignore the mandate.<sup>70</sup>

Then areas of concern were expressed:

Our review of the Draft Convention has revealed that Part XI of the text would, in its present form be a stumbling block to treaty ratification. . . . We intend at this session, if we are given the opportunity to do so, to engage in intensive discussion to elaborate with precision and detail the points which have been raised in our review.<sup>71</sup>

Part XI of the Draft Convention<sup>72</sup> is an area that is specifically related to the international seabed.<sup>73</sup> Ambassador James Malone

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66. Statement by Theodore G. Kronmiller, Deputy Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs, before the Marine Technology Society, Sept. 8, 1981 (on file with the author).

67. The United States review process was accelerated between the two sessions but the missing ingredient was an assessment of the negotiability of areas of concern with the Draft Convention that had been identified in the review process. U.S. Delegation Report, Tenth Session of the Third United Nations Conference of the Law of the Sea, New York, Mar. 9-Apr. 24, 1981 and Geneva, Aug. 3-Aug. 28, 1981, at 3 (unpublished report on file with the author) [hereinafter cited as U.S. Delegation Report].

68. *Id.* at 4. "The U.S. delegation placed primary emphasis on finding opportunities in which reasoned debate and discussion could occur so as to assist in assessment of the negotiability which it was instructed to make."

69. Statement by James L. Malone, Aug. 5, 1981, *supra* note 65.

70. *Id.*

71. *Id.*

72. *Id.*

73. The mining of manganese nodules is at the heart of the deep seabed controversy. Nodule mining is characterized by technology in the hands of a few companies from industrialized countries grouped into international consortia. The United States, United Kingdom, Belgium, West Germany, France and the Nether-

voiced many of the same concerns he had testified to before Congress in the spring. Policy objections were stressed. One particular concern with Part XI relates to decision making in the International Seabed Authority. Burdensome regulation of the seabed and subsoil beyond national jurisdiction would be created by the treaty.<sup>74</sup> The scope of the Assembly's power and its relationship to the Council are of particular concern to the United States. One country or a group of countries could dominate others where vital interests are at stake. The Assembly, acting as a "supreme organ", might seek to use ambiguous treaty provisions. This could increase its discretion and have an impact on the Council's executive function or even the rights of states.<sup>75</sup>

Although the composition, procedure and voting in the Council have been decided after intense and difficult negotiations, the United States still doubts its interests are adequately protected. A certain lack of equilibrium exists. The Soviet Union and its allies have three guaranteed seats but the United States must compete with its allies for any representation.<sup>76</sup>

Questions have also been raised about voting in the Council. The present voting system could paralyze the Council with ease. There should be a means to simplify decision making on certain subjects while assuring the countries in a minority position an effectual voice on issues of vital interest to them.<sup>77</sup>

The administrative machinery in Part XI also raises questions with respect to awards of contracts. There is no assurance that the legal and technical commission of the Authority<sup>78</sup> will grant a right of access to a qualified applicant submitting a formal written plan of work. Moreover, it is not even clear that the plan of work will be acted upon at all.<sup>79</sup>

Another concern deals with discrimination.<sup>80</sup> While the Draft

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lands, are all exploring possibilities. Richardson, *The United States and the Current Status of Deep Seabed Mining at the Third United Nations Conference on the Law of the Sea*, 11 ENV'T'L L.Q. 193 (1980-81).

74. See Draft Convention, *supra* note 3, art. 153.

75. *Id.* art. 157, para. 2.

76. The United States would seek an arrangement for permanent representation by the U.S. on the Council, as the socialist group of Eastern European countries have under the present Draft Convention. U.S. Delegation Report, *supra* note 67, at 7.

77. The United States should have a stronger voice in the Council's decisions. The method of decision making could undercut the effectiveness of the executive council. *Id.* at 6.

78. The Authority is the international body which will supervise the conduct of deep seabed mining.

79. Access of United States Nationals could not be assured under the Draft Convention. U.S. Delegation Report, *supra* note 67, at 7.

80. See Draft Convention, *supra* note 3, art. 153. There were many discriminatory provisions which taken together with the powers and functions of the Assem-

Convention expressly admonishes discrimination in Article 153,<sup>81</sup> the vulnerability of national economics created by the lack of critical raw materials makes it important to assure all states a right of access to seabed resources without discrimination. The United States believes that developing countries and the Enterprise are favored to the "detriment" of others.<sup>82</sup>

The Authority's policies with respect to promotion of mineral resource development is another concern. The United States is sensitive to dependence upon foreign sources for raw materials. "There is a widespread view in the United States that for the benefit of all mankind a Law of the Sea Treaty should encourage and promote the development of deep seabed resources."<sup>83</sup> The treaty gives the impression that encouragement and promotion are not overriding policy objectives of the Draft Convention.<sup>84</sup>

After fifteen years the Draft Convention provides that the provisions of the treaty will be reviewed. After five years, a two-thirds vote could ratify an amendment.<sup>85</sup> The United States would be bound by the ratified changes. Here a constitutional question is raised.<sup>86</sup> The problem is: can the United States be bound by an amendment to a treaty when the amendment does not have the advice and consent of the Senate?

The United States is likewise concerned that the treaty unreasonably interferes with governmental operations and budgetary considerations of individual nations.<sup>87</sup> "Our government is embarked on a course to reduce inflation and stimulate productivity."<sup>88</sup> The Draft Convention may create a situation where funds provided in part by the United States government would eclipse

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bly and the Council could interfere with mining operations. U.S. Delegation Report, *supra* note 67, at 7.

81. Actually the Authority and the Enterprise were created on the assumption that they would have a monopoly. Production controls are nonsense, according to Dr. Arvid Pardo. Lecture by Dr. Arvid Pardo to the International Law Society, University of San Diego, Nov. 25, 1981. To continue to compete, nations only have to shift jurisdiction. Also copper sulphate found in the Pacific have many minerals that are the same as those found in manganese. When national jurisdiction extends over manganese nodules or copper sulphate deposits, controls weaken.

82. Statement by James L. Malone, Aug. 5, 1981, *supra* note 65.

83. *Id.*

84. This is for the protection of the land-based producers of the same minerals. See Draft Convention, *supra* note 3, art. 155, para. 1.

85. *Id.* art. 155, para. 4.

86. See U.S. CONST. art. II, § 2.

87. Statement by James L. Malone, Aug. 5, 1981, *supra* note 65.

88. *Id.*

mining activities by private American companies.<sup>89</sup>

A few weeks later Ambassador Malone issued a further statement to the Group of 21. He described eight specific areas in which United States' objectives are not met adequately by the Draft Convention. They offer a succinct statement of the Draft Convention articles found by the United States to be objectionable:<sup>90</sup>

1. the powers and functions of the Assembly
2. the composition of and decision making in the Council
3. the Authority's policies with respect to promotion of mineral resource development
4. the predictability of access for private companies
5. discrimination in favor of the Enterprise as it affects the competitive position of private companies
6. the Review Conference—in particular, the applicability of any amendments adopted by it that lack the advice and consent of the Senate
7. discretionary powers that could lead to unreasonable interference with operations, and
8. the budgetary impacts on individual nations of obligations created by a law of the sea treaty.

The United States asked the other nations to react to this list of objections.<sup>91</sup> These reactions and comments are to be weighed before the United States makes any final decisions on whether or not to support the Draft Convention.<sup>92</sup>

The Chairman of the Group of 77, Mr. Inam ul Haq, stressed problems inherent in any attempts to reopen negotiations at this advanced stage. These negotiations had been participated in and approved by the United States for nine sessions of UNCLOS. The Group of 77 did not feel that they should be asked to negotiate further or make any further concessions.<sup>93</sup> The opinion of the Third World spokesman was that the Draft Convention already represents compromises made by both the industrialized countries and developing countries. He stated:<sup>94</sup>

The text appearing in ICNT Rev. III is not a text proposed to the liking of the States members of the Group of 77. We have no desire to defend it. We have traveled a long way from our original position. We have made all

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89. The United States delegation indicated that the United States was troubled by uncertainties with respect to the total cost of the treaty to the United States Treasury, and on the effect of financial obligations on the profitability of mining operations. U.S. Delegation Report, *supra* note 67, at 10.

90. Statement by Theodore G. Kronmiller, Sept. 8, 1981, *supra* note 66.

91. *Id.*

92. *Id.* Reports of various groups in the United States studying the situation will also be weighed. See, e.g., R. Keating, *The Law of the Sea Treaty: An Overall Assessment with Recommendations for Executive Action* (Dec. 15, 1980) (unpublished report by member of President-elect Reagan's Foreign Policy Advisory Council and Strategic Minerals Task Force) (on file with author).

93. Statement by Inam Ul-Haq to the Informal Plenary, Tenth Session of the Third United Nations Conference on the Law of the Sea, Geneva, Aug. 17, 1981 (unpublished copy circulated on the meeting floor on file with the author).

94. *Id.*

concessions possible, more should not be asked of us. In all negotiations a stage is reached where the participants must call a halt to any further demands. We have sacrificed too many interests. We cannot sacrifice any more. Nor can we afford to permit the labour of many years to slip through our fingers; . . . The eight objectives spelled out by Ambassador Malone cannot form the basis of a dialogue which the United States seeks.<sup>95</sup>

Since the Draft Convention is based upon consensus, its various parts are intertwined. "The unraveling of even one mini-package could result in a breakdown of the whole package that has been put together after years of negotiation."<sup>96</sup> Senyon P. Kozyrev, the Soviet negotiator, charged the United States with wanting to "wreck the negotiations to free its hands for unilateral action to seize arbitrarily the sea space and the resources of the world oceans."<sup>97</sup> He himself then raised objections to parts of the proposal.<sup>98</sup> Nonetheless, Kozyrev argued that a revision of the Convention to meet United States' objections would destroy the entire package of compromise decisions underlying the Draft Convention. Since Part XI is an organic constituent element of the compromise, it cannot be changed.<sup>99</sup> Likewise Ambassador Jen Evenson of Norway also likened the compromises reached in the convention to a package deal, which comprises the totality.<sup>100</sup>

On the contrary other opinions gave support to the United States' position.<sup>101</sup> Most western countries cannot imagine any treaty being concluded without the United States' agreement. These countries believe a consensus with the United States' support is indispensable to the effective application of the future Convention.<sup>102</sup> France's position was that there would be no real value to an agreement on the exploration of the seabed if it did not involve the United States, West Germany and the most tech-

95. *Id.*

96. *Id.*

97. N.Y. Times, Aug. 7, 1981, § A, at 5, col. 2.

98. *Id.*

99. Statement by the S.P. Kozyrev to the General Committee, Tenth Session of the Third United Nations Conference on the Law of the Sea, Aug. 17, 1981 (unofficial translation distributed at the Conference on file with the author).

100. Statement by Ambassador Jens Evenson (Norway) to the Informal Plenary, Tenth Session of the Third United Nations Conference on the Law of the Sea, Geneva, Aug. 10, 1981 (copy circulated at the Conference on file with the author).

101. Even President Koh said that though delay was regrettable, a Draft Convention without the participation of a major maritime power would be a weakened convention. U.N. MONTHLY CHRON., May, 1981, at 13.

102. N.Y. Times, Aug. 16, 1981, § A, at 11, col. 1.



nologically advanced countries in this field.<sup>103</sup> West Germany also has taken a hard line and supported the United States.<sup>104</sup>

Presently, the United States' review of the Draft Convention has reached the point where options are being considered. The options will be presented to President Reagan for his decision.<sup>105</sup> The United States could withdraw from the Convention, accept the Convention or go back in March and continue negotiations. If the decision is to go back and negotiate at the Eleventh Session of UNCLOS III, we will need a great deal of help from our allies and a strong negotiating team.

With the United States keeping mostly to the sidelines, the Conference did not accomplish a great deal at Geneva. A significant amount of time was spent on the discussion of the United States' position and review. However, certain matters were discussed and decided. Although Committee II and Committee III did not meet, Committee I met regularly and work was accomplished by the Draft Committee and the Informal Plenary. Plans were to continue to attempt to resolve matters unresolved by the Ninth Session of UNCLOS III.<sup>106</sup>

### *Drafting Committee*

Once again a great deal of time at the Geneva meeting was devoted to drafting problems.<sup>107</sup> The Drafting Committee met continuously from June 29 until the end of the Conference. Work was done on the disputes settlement and conciliation texts.<sup>108</sup> Also, language changes for Part XI, Articles 188, 190, 191 were approved.<sup>109</sup>

It is the duty of the Drafting Committee to adjust the wording of the text in order to insure the future Convention would be le-

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103. See *Le Monde* (Paris), Aug. 20, 1981, reprinted in *WORLD OPINION*, *supra* note 42, No. 31, Aug. 20, 1981.

104. "So far, the Federal Republic of Germany has opposed the proposed seabed regime, to no avail. But now it has a strong ally in the United States." Frankfurter Allgemeine (Germany), Aug. 4, 1981, translated and reprinted in *WORLD OPINION*, *supra* note 42, No. 29, Aug. 18, 1981. "Developing countries have turned down flat the United States request for renegotiation . . . That is why the United States now stands in need of support from parties of significant political weight—for example, the EEC (European Economic Community). But if the EEC failed to produce a common standpoint, member countries dissatisfied with the Draft Convention such as Belgium and the Federal Republic of Germany would have to go it alone. The German delegation will have to prove its mettle." Handelsblatt (Germany), Aug. 13, 1981, translated and reprinted in *WORLD OPINION*, *supra* note 42, No. 29, Aug. 18, 1981.

105. Statement by Theodore G. Kronmiller, Sept. 8, 1981, *supra* note 66.

106. U.N. Doc. A/Conf.62/BUR/SR.64 (prov. ed. 1981).

107. *Id.*

108. Statement by James L. Malone, Aug. 5, 1981, *supra* note 65.

109. U.N. Doc. A/Conf.62/L.75/Add.4 (1981).

gally enforceable in all languages. Although the Drafting Committee was under a sense of urgency, they were anxious to do the job well. This demanded patience, work and skill.

### *Committee I*

The Working Group of 21<sup>110</sup> met regularly and continued work on the arrangements for the Preparatory Commission. Yet some important Preparatory Commission questions still need to be answered. These include: which states should be members of the Commission, how it should make decisions, and how it should be financed and when it should be terminated? Discussion continued on all of these, while decisions were postponed until the Eleventh Session.<sup>111</sup>

### *Committee II*

Committee II did not meet formally during the Geneva meeting.<sup>112</sup> Negotiation continued on the issue of delimitation of boundaries between nations with adjacent coasts.<sup>113</sup> The solution presented by President Koh received support from both negotiating groups that had been working on the issue.<sup>114</sup> Decision will be left to the states with adjacent coasts concerned to reach an equitable agreement by direct negotiations.<sup>115</sup> Although the United States, Arab countries, Israel and Venezuela all asked that

110. The Working Group of 21 was formed at the request of developing nations to consider Committee I issues in a smaller forum. This is a group of limited membership, co-chaired by the President of UNCLOS and the Chairman of Committee I.

111. U.N. Doc. A/Conf.62/BUR/SR.64 (prov. ed. 1981).

112. Statement by Theodore G. Kronmiller, Sept. 8, 1981, *supra* note 66.

113. *Id.*

114. "The Conference achieved agreement on the elimination of any express reference to median or equidistance line, and limited the entire provision to a rule of delimitation by agreement. . . ." U.S. Delegation Report, *supra* note 67, at 13.

115. Article 74(1) now reads:

The delimitation of the exclusive economic zone between states with opposite or adjacent coasts shall be effected by agreement on the basis of international law as referred to in Article 38 of the Statute of the International Court of Justice in order to achieve an equitable solution.

Article 83(1) now reads:

The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

*Cf.* Second Revised Informal Composite Negotiating Text, U.N. Doc. A/Conf.62/WP.10/Rev.2 (1980), arts. 74(1), 83(1) (the text of the articles prior to the change).

the matter be deferred, it was decided to include the solution in the revision of the Draft Convention.<sup>116</sup> Delimitation was the only problem area left over from the Ninth Session of UNCLOS III that was resolved at the Tenth Session.<sup>117</sup>

### *Informal Plenary*

At the meeting in Geneva an indicative vote was taken in informal plenary to choose sites for the proposed International Seabed Authority and the proposed Tribunal for the Law of the Sea.<sup>118</sup> Moreover, all of the candidates agreed in advance to be bound by the results of the voting. The site selection will only apply if the state selected is a party to the Convention when it enters into force.<sup>119</sup> Jamaica was chosen as the site of the projected Seabed Authority and Hamburg in West Germany was chosen as the site of the Tribunal.<sup>120</sup> Germany gave the following reasons to support Hamburg's selection as the site of the Tribunal: Hamburg is a city of high international standing which would be a representative seat for such an institution and it offers all the facilities for the Tribunal to function effectively and successfully.<sup>121</sup>

At the conclusion of the Conference the delegates decided to issue a new text of the Draft Convention.<sup>122</sup> To provide the revision with a "higher status than the present text" the Conference decided it would be given the document symbol "A/CONF.62/L.78".<sup>123</sup> The new text can only be changed in accordance with the rule of consensus and no amendment can be submitted until all efforts to achieve consensus are exhausted.<sup>124</sup> Tommy Koh commented on the proposal to convert the informal text into an "official" text: "This is not just putting on some cosmetics that do

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116. Statement by Theodore G. Kronmiller, Sept. 8, 1981, *supra* note 66.

117. San Diego Union, Aug. 29, 1981, § A, at 12, col. 2.

118. SEA/146, *supra* note 18, at 2, 3.

119. Statement by Theodore G. Kronmiller, Sept. 8, 1981, *supra* note 66.

120. San Diego Union, Aug. 29, 1981, § A, at 12, col. 1.

121. U.N. Doc. A/Conf.62/111 (1981). The Federal Republic of Germany, a country with a short coast line, belongs to the group of landlocked and geographically disadvantaged states.

122. SEA/146, *supra* note 18, at 1. At the same time it decided that "the door would be kept open for the continuation of consultations and negotiations on certain issues." This revised text incorporated over 1500 Drafting Committee changes. U.S. Delegation Report, *supra* note 67, at 16, 17.

123. SEA/146, *supra* note 18, at 3. By assigning the symbol "L" the text was elevated to an official status. *Id.*

124. Statement by Theodore G. Kronmiller, Sept. 8, 1981, *supra* note 66. It was not made a formal text closed to negotiation and open to formal amendments, but by deleting the words informal text in its title and giving it an official limited document number, it gave the text a higher status. U.S. Delegation Report, *supra* note 67, at 17.

not have any legal meaning."<sup>125</sup> He said it was a "very significant and definitive step."

It will be the official Draft Convention of the Law of the Sea of the Conference subject, however, to the following three conditions:

First, the door would be kept open for the continuation of consultations and negotiations on certain outstanding issues. The results of these consultations and negotiations if they satisfy the criterion in A/CONF.62/62, will be incorporated in the Draft Convention by the collegium without the need for formal amendments.

Second, the Drafting Committee will complete its work and its further recommendations, approved by the Informal Plenary, will be incorporated in the text.

Third, in view of the fact that the process of consultations and negotiations on certain outstanding issues will continue, the time has, therefore, not arrived for the application of rule 33 of the Rules of Procedure of the Conference.<sup>126</sup>

This leaves open the possibility of further negotiation with the United States and of final adoption of a text.

A work schedule was decided upon for the Eleventh Session. It provides time for additional negotiations in pending issues and a vote to formalize and adopt the Draft Convention.<sup>127</sup> The Eleventh Session will last eight weeks. The first three weeks will be reserved for negotiations and consultations. Several days will then be devoted to reviewing the results of the negotiations and producing a new text.<sup>128</sup> The Conference will then meet on April 6, to decide on the date on which to begin the formal procedures of amendment submission.<sup>129</sup> The remaining weeks will allow for voting. The Convention will open in Caracas, Venezuela in early September, 1982.<sup>130</sup>

The Conference President, Tommy T. B. Koh, said the Conference gave the United States a clear signal that it intended to complete the treaty at the New York meeting. He has vowed to achieve a treaty in the next "spring's session come hell or high water" and with or without the United States.<sup>131</sup>

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125. SEA/146, *supra* note 18, at 1.

126. U.S. Delegation Report, *supra* note 67 at 17.

127. Statement by Theodore G. Kronmiller, Sept. 8, 1981, *supra* note 66.

128. *Id.*

129. *Id.*

130. SEA/146, *supra* note 18, at 1.

131. San Diego Union, Aug. 29, 1981, § A, at 12, col. 1.

*Disputes Concerning Sovereignty over Coastal Waters*

While negotiations proceed on UNCLOS, unilateral declarations by states asserting their dominion over specified zones continue to be made.<sup>132</sup> Libya's Col. Muammar Khadafy, for example, maintains that all the Gulf of Sidra, from its inner shoreline to its 200-mile wide mouth, is within the boundaries of Libyan territorial waters.<sup>133</sup>

The United States continues to hold on to the old fashioned position that territorial waters end three miles offshore, or the limit a medieval cannon could throw an iron ball. Col. Khadafy claims Libya is entitled to absolute sovereignty, as opposed to simply resource ownership in the 200-mile zone.<sup>134</sup> Most countries that have extended their fishing zones to 200 miles call this zone an exclusive economic zone (EEZ) that does not infringe upon the "right of innocent passage".<sup>135</sup> Khadafy's claims are disputed and, therefore, unrecognized by almost every nation on earth, including the United States.<sup>136</sup>

In August, 1981, two United States jets were conducting naval exercises in the southern Mediterranean and northern part of the Gulf of Sidra.<sup>137</sup> Libyan planes intercepted and fired upon the jets, claiming they were in Libyan air space.<sup>138</sup> The Libyan planes were warned and eventually shot down by the American jets

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132. The boundaries are generally 200 nautical miles from the states coast for economic and fishing zones, and 12 miles from the coast for the territorial sea. For a background in boundaries see KNIGHT, *supra* note 59, at 3-1 to 3-30. *See also Recent Development 1978-1979, supra* note 2, at 718 n.140.

133. "What Libyan President Khadafy has done is to take the concept of the 200 mile economic zone and has applied it to his country's territorial waters." Advocate News (Bridgetown), Aug. 23, 1981, at 4, *reprinted in* 170 WORLDWIDE REPORTS, LAW OF THE SEA 12 (1981).

The United States Fishing Conservation and Management Act of 1976, 16 U.S.C. §§ 180-182 (1976) declares the United States will have exclusive fishing management authority within the zone.

134. In 1973, by unilateral proclamation, Libya claimed the whole Gulf south of a line drawn along latitude 32°30' as its internal waters. It ran its 12 mile wide strip of territorial waters along this baseline instead of along the shore. The Gulf of Sidra is 300 miles wide. The Economist, Aug. 29, 1981.

135. High Seas freedom permits surface passage beyond the twelve mile contiguous zone, while allowing coastal States to enforce certain customs and immigration regulation in the twelve mile zone. The United States and the Law of the Sea, *supra* note 23, at 2.

136. San Diego Union, Aug. 20, 1981, § A, at 8, col. 5. The existing international law on this issue is contained in the 1958 U.N. Convention on the Territorial Sea, which Libya did not accept. The Economist, Aug. 29, 1981.

137. American and Libyan aircraft clashed in the sky above the Mediterranean on August 19, 1981.

138. *See* KNIGHT, *supra* note 59, at 1-2.

when they did not turn away.<sup>139</sup> United States President Ronald Reagan subsequently told Libya that United States naval maneuvers in the Mediterranean would go forward in the future as planned.<sup>140</sup>

### *Extension of Sovereignty over Fishing and Territorial Waters*

States continue to declare sovereignty over waters extending 200 miles from their shore.<sup>141</sup> Oman extended its economic zone 200 miles seaward on February 20, 1981<sup>142</sup> and Thailand announced a 200 mile economic zone on February 23, 1981.<sup>143</sup> Efforts were also being made to extend the exclusive economic zone of India, which is now between 12 nautical miles and 200 nautical miles.<sup>144</sup>

In Brazil, the Foreign Ministry is conducting a broad study of the law of the sea. Brazil is considering a new position that favors sovereignty over only 12 nautical miles adjacent to its coast. The other 188 miles would remain as an exclusive economic zone. Without resorting to decrees or documents, Brazil's position as a supporter of the 200 mile territorial sea is set aside.<sup>145</sup>

### *Delimitation of the Continental Shelf*

The Norwegian and Icelandic governments have both indicated that they have accepted the recommendations by an arbitration commission for a division of the continental shelf around Jan Mayer.<sup>146</sup> These recommendations should serve as the basis for

139. San Diego Union, Aug. 21, 1981, § A, 7.

140. The Reagan Administration's handling of the dogfight with the Libyans shows it does small things well. Wall St. J., Aug. 20, 1981, at 22, col. 1.

141. Many countries have declared 200 mile fishing zones. The extensions have had considerable impact on the world fishing industry since only about one percent of the world catch of fish occurs beyond 200 miles from shore. See *Recent Developments 1978-1979*, *supra* note 2, at 718 n.140.

142. OFFICE OF THE GEOGRAPHER, U.S. DEP'T OF STATE, LIMITS IN THE SEAS 7 (No. 36, 4th rev. 1981).

143. *Id.*

144. Also, the India Coast Guard organization is exploring the possibilities of acquiring jurisdiction under the Criminal Procedures to apprehend smugglers, and other intruders in the Indian territorial waters. Patriot (New Delhi), July 1, 1981, at 4, reprinted in 164 WORLDWIDE REPORTS, LAW OF THE SEA 5 (1981).

145. Journal do Brasil (Rio de Janeiro), Aug. 23, 1981, at 16, translated and reprinted in 171 WORLDWIDE REPORTS, LAW OF THE SEA 13 (1981).

146. This was the statement made by the American Chairman of the arbitration commission Elliot Richardson, when he presented the Commission's recommendations at a Press Conference in Oslo, together with Ambassador Jens Evenson.

future negotiations.<sup>147</sup>

The commission suggested that Iceland should have that part of the continental shelf that extends 200 nautical miles from its shores and follows the fishing zone boundary established last year.<sup>148</sup> At the same time, the commission recommends joint exploration by Norway and Iceland of any oil and gas resources on the continental shelf. Each country would have rights to 25% of the funds coming from development in the other country's sector.<sup>149</sup>

The European Parliament voted unanimously to recognize the preferential status for the territorial waters, economic zone and continental shelf of the Greek islands.<sup>150</sup> The continental shelf will figure in the customs boundaries of Europe.<sup>151</sup>

### *Fishing Disputes*

Recently, United States' tuna boats were seized while fishing in Mexico's 200-mile exclusive economic zone (EEZ).<sup>152</sup> While the United States itself has declared a 200-mile fishing zone, it refuses the right to control migratory fishing within such a zone.<sup>153</sup> The United States' rationale is that a country should not be allowed to control migratory fish just because they happen to swim within

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Afterposten (Oslo), May 23, 1981, at 8, *translated and reprinted in* 161 WORLDWIDE REPORTS, LAW OF THE SEA 12 (1981). Elliot Richardson of the United States was chairman of the arbitration commission.

147. *Id.*

148. *Id.*

149. *Id.* According to Richardson, the Commission has taken current Law of the Sea regulations into consideration but they have not been found useful in the Jan Mayan dispute. Richardson said the recommendation of the Commission to have joint exploration of the resources rather than a demarcation line outside the economic zone is based on thorough geological investigation of the area. The report also states that Iceland's total dependence on oil imports and the fact that the country's own continental shelf contains hardly any viable hydrocarbon deposits was given consideration. Consideration was also given to the desire to promote cooperation between Norway and Iceland.

150. Athens News (Athens), Sept. 19, 1981, at 12, *reprinted in* 172 WORLDWIDE REPORTS, LAW OF THE SEA 22 (1981).

151. Ivradyini (Athens), June 18, 1981, at 1, 12, *translated and reprinted in* 167 WORLDWIDE REPORTS, LAW OF THE SEA 13 (1981). The Greek position on the continental shelf of the Aegean islands is completely vindicated.

152. *See generally Recent Developments 1979-1980, supra* note 17, 535, 573 (1981). The "Tuna War" caused by Mexico's ambitious expansion of its fleet, has led to a U.S. embargo on Mexican tuna products. The Secretary of State can direct the Secretary of the Treasury to prohibit the importation of fish and fish products from any country which seizes United States fishing boats under a claim of jurisdiction. The Fishing Conservation and Management Act of 1976, 16 U.S.C. § 1825(a)(4) (1976).

153. Under United States law, the 200-mile zone does not apply to highly migratory fish such as tuna. 16 U.S.C. § 1801(b)(1) (1976). For a list of migratory fish see Draft Convention, *supra* note 3, Annex I.

200 miles of its coast.<sup>154</sup>

This may change. A bill was introduced to the House of Representatives on September 10th to revoke tuna fishing by foreign vessels within the 200-mile offshore fishing limit.<sup>155</sup> "We have a choice of allowing irreparable damage to the bluefin and other tuna or preserving them as a domestic and economic resource," Representative James J. Howard (New Jersey) declared at a hearing before the Merchants Marine and Fisheries Subcommittee on Fisheries.

Theodore Kronmiller, Deputy Assistant Secretary of State for Oceans and Fisheries Affairs, said any restrictions on tuna fishing rights in United States' waters might provoke retaliation by foreign governments.<sup>156</sup>

Japan, like the United States, believes that 200-mile exclusive economic zones do not include migratory fish.<sup>157</sup> A Japanese fishing trawler was seized inside the exclusive Seychelles maritime economic zone.<sup>158</sup> In order to fish in this zone a fishing license amounting to approximately 20,000 rupes a month must be paid.<sup>159</sup>

Since Canada and the United States have both declared 200-mile fisheries jurisdiction, the countries have had problems delineating boundaries and agreeing on fisheries management.<sup>160</sup> In March 1981, after nearly two years in committee and after amendments were added regarding scallop management, the fishing and boundary portions of the agreement were separated.<sup>161</sup> The

154. Two San Diego based tunaboats, the Cindy Ann and the United States, were seized east of Mazatlan in July. The tuna was confiscated and the boats were fined. San Diego Union, July 15, 1981, § B, at 3, col. 5.

155. N.Y. Times, Sept. 27, 1981, § 1, at 44, col. 1.

156. Negotiations between the United States and other countries might be undercut.

157. Japan shares this view and also has suffered seizures. See *Recent Developments 1978-1979*, supra note 2, at 720 n.153.

158. The seizure occurred when a Japanese trawler was caught fishing illegally inside the exclusive Seychelles Maritime Economic Zone. Nation (Victoria), Jan. 21, 1981, at 1, 2, *translated and reprinted in* 141 WORLDWIDE REPORTS, LAW OF THE SEA 18 (1981).

159. *Id.* When the trawler was boarded there were 90 tons of fish on board. The fishing service pointed out that foreign ships cannot fish in the interior of the exclusive maritime economic zone without paying a fishing license amounting to approximately 20,000 rubles per month in favor of the Seychelles state.

160. Soundings, June/July 1981, supra note 23, at 1. This has occurred in the Gulf of Maine area. In 1977, negotiations began on these sensitive issues.

161. *Id.*



boundary settlement portion of the treaty is not in effect because the United States amendments have not received Canadian approval.<sup>162</sup> The East Coast Fishery Resources Agreement will be withdrawn from Senate consideration soon.<sup>163</sup> A treaty between the United States and Canada allowing full and unlimited fishing for albacore and warm water tuna in the Pacific Coast was ratified by the Senate by a vote of 97-0.<sup>164</sup>

Iceland and the Faeroes signed a new 1981 fishing pact in Reykjavik. According to the pact, the Faeroes will be permitted to fish within the Icelandic 200 mile limit. The main emphasis has been to limit the fishing of cod. The Faeroes may catch only 6,000 tons.<sup>165</sup> There now exist agreements that authorize Belgium, the Faeroes Island and Norway to fish within the Icelandic fishing waters.<sup>166</sup>

A two year renewable fishing contract was signed between Jamaica and Colombia, ending eleven years of negotiations between the two countries. Seizure of Jamaican fishing boats should be eliminated with the signing of the agreement.<sup>167</sup>

At a recent fisheries meeting in Havana, Sri Lanka was given the task of coordinating the nonaligned countries for joint ventures in industrial fishing.<sup>168</sup> Sri Lanka's Minister of Fisheries told the Sri Lanka Broadcasting Corporation that the honor was significant because of the abundance of unexploited fishery resources in the Indian Ocean.<sup>169</sup>

### *Porpoise Quotas*

The Reagan administration has thrown support behind efforts to ease the 1972 Marine Mammal Protection Act which regulates the tuna industry in the United States.<sup>170</sup> Annual quotas for

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162. *Id.*

163. *Id.*

164. N.Y. Times, July 21, 1981, § A, at 5, col. 5.

165. Morgunbladid (Reykjavik), Jan. 16, 1981, at 16, *translated and reprinted in* 141 WORLDWIDE REPORTS, LAW OF THE SEA 25 (1981).

166. *Id.*

167. The Daily Gleaner (Kingston), Aug. 1, 1981, at 1, *reprinted in* 167 WORLDWIDE REPORTS, LAW OF THE SEA 7 (1981). Dr. Neville Gallimore, Minister of State in the Foreign Affairs Ministry who signed for Jamaica, said that Jamaican fishermen were now allowed to catch 840 metric tons of fish annually off the Colombian coasts.

168. Colombo Int'l Service, Apr. 24, 1981, *reprinted in* 155 WORLDWIDE REPORTS, LAW OF THE SEA 2 (1981). Among other matters taken up at the Havana Conference was the role of the traditional small-scale fisherman, shipbuilding, better marketing facilities, and the exchange of scientific and technological information.

169. *Id.* Sri Lanka's Minister of Fisheries, Festus Perera, was elected the Vice-chairman of the Conference. Four steering Committees were approved.

170. The Commerce Department has adopted regulations limiting the number

porpoises that fisherman inadvertently kill in the course of netting tuna would be eliminated by a bill pending in the House Merchant Marine and Fisheries Committee.<sup>171</sup> Environmentalists and the tuna industry agree that fishermen are now saving enough porpoises from their nets to avoid depleting the Pacific area porpoise herds.<sup>172</sup> The levels would not have to approach zero to be acceptable.

### *Meeting of the International Whaling Commission*

President Reagan made a personal plea to the International Commission on Whaling (IWC)<sup>173</sup> for an indefinite moratorium on commercial whaling.<sup>174</sup> So far, cooperative efforts to regulate whaling have been unsuccessful. Species after species have been overexploited. Soon after, the IWC rejected a ban on commercial whaling. Sixteen countries voted for the moratorium proposed by the United States and Britain, eight voted against, three abstained and three others did not take part. For the sixth year the vote did not reach the seventy-five percent majority necessary to stop whaling.<sup>175</sup> "The nations of this IWC voted two to one to stop whaling but the slaughter of these magnificent creatures will continue."<sup>176</sup> The IWC did impose a virtual ban on the hunting of sperm whales.<sup>177</sup>

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of porpoises that may be killed as tuna are netted. The 1981 limit is set at 20,500 porpoises. L.A. Times, Oct. 22, 1980, § 1, at 3, col. 5.

171. The amendment to the 1972 Marine Mammal Protection Act now pending in the House Merchant Marine and Fisheries Committee is significant because it removes costly and impractical requirements in present law to reduce the porpoise kill to "levels approaching zero". San Diego Union, July 14, 1981, § A, at 1, col. 2.

172. Porpoises are often found with migrating yellow fin tuna, and fishermen inevitably trapped large numbers of porpoises which were drowned before they could free themselves. Tuna fishermen developed nets and techniques that have reduced the kill from an estimated 300,000 a year to only 7,500 this year. San Diego Union, July 16, 1981, § B, at 10, col. 1.

173. The International Whaling Commission was established by the International Commission for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849, 161 U.N.T.S. 72.

174. Reagan's views were made known in a letter delivered to the 30-nation commission at the start of its annual meeting. Japan, one of the major whaling nations, said in its opening statement that it found no legal or moral obligation to accept such a moratorium. N.Y. Times, July 21, 1981, § 1, at 5, col. 5.

175. N.Y. Times, July 22, 1981, § 1, at 5, col. 1.

176. *Id.* David Phillips represented the Friends of the Earth group.

177. N.Y. Times, Aug. 2, 1981, § 4, at 22, col. 1. For several kinds of whales—blue, fin, humpback and gray—protections that have been imposed in the last few years may be late. There may be hope, though, for the sperm whale. After the 1981 sea-

### *Antarctic Experimental Program*

Marine scientists from South Africa and ten other countries have begun an experimental program to study the extent and the distribution of krill in the Southern Ocean around Antarctica. Their purpose is to provide controls over the future exploitation of this important protein resource.<sup>178</sup>

The krill, a shrimp-like organism, is a vital link in the food chain of this region of the southern hemisphere. The Southern Ocean could provide a harvest of krill equal to the total amount of fish caught annually in the world. Its abundance needs to be known more accurately before large scale exploitation can be considered. The experiment is part of an internationally planned program known as BIOMASS (Biological Investigations of Marine Antarctic Systems and Stocks).<sup>179</sup>

### *Offshore Petroleum Exploration, Federalism v. States' Rights*

A federal judge held that California can veto government programs if they are deemed inconsistent with its coastal managerial plans. Judge Marion Phaezen said the state can block the Department of Interior's sale of oil drilling leases for more than 150,000 acres of coastal water.<sup>180</sup> With 80,000,000 potentially oil rich acres in offshore areas in the balance, along with 795 million acres abutting other coastal states, Departmental lawyers plan to appeal.<sup>181</sup> After the decision, Secretary James G. Watt said offshore drilling off the Northern California coast would be deferred at least until 1983.<sup>182</sup>

The Interior Department also said it would modify its offshore oil and gas drilling program to provide for greater consideration of

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son the International Whaling Commission will impose a virtual ban on the killing of sperm whales.

178. South African Journal of Science (Johannesburg) Feb. 1981, at 65, *reprinted in* 161 WORLDWIDE REPORTS, LAW OF THE SEA 11 (1981).

179. *Id.* Last year, 15 countries concerned with the Antarctic region agreed at a convention to conserve its marine life. A commission will be established as a result of this meeting. A scientific committee under the commission will then be established to encourage and to co-ordinate scientific studies. The BIOMASS program will contribute information on the ecology of the Southern Ocean.

180. N.Y. Times, Aug. 2, 1981, § 4, at 22, col. 1.

181. *Id.*

182. Sacramento Bee, Aug. 8, 1981, § 1, at 1, col. 2. Governor Brown said Watt's announcement signals "a major retreat in his efforts to desecrate the California coast." The Governor pledged to continue to fight in the courts and in Congress until Watt "once and for all ceases and desists his continuing efforts to despoil our coast." Deferring drilling until 1983 would give the United States Supreme Court time to rule on whether states have veto power over such decisions. Watt's action rules out a lease sale this year to award drilling rights in four offshore areas covering 700,000 acres.

environmental risks.<sup>183</sup> Environmental groups and state governments have asserted that the pace of the leasing program would make it difficult to protect marine habitats and coastal economies dependent on fishing and tourism. This decision of the Interior Department was made in response to an order issued by the United States Court of Appeals for the District of Columbia.<sup>184</sup> Costs and risks in the program should include a better weighing of "environmental" and "social" costs. Secretary James G. Watt said that there would now be "technical" and analytical modifications of the leasing program. The leasing program is designed to make a billion acres of the continental shelf available for exploration by oil and gas companies over the next five years.<sup>185</sup>

### *Deep Sea Nodules*

India is planning a major venture into deep sea mining following the recent discovery of huge areas of polymetallic nodules in the Indian Ocean.<sup>186</sup> The Minister of State for Science and Technology told Parliament the nodules were found on a large scale near a crater about 240 kilometers from the southern tip of Indian territory. The exploration and survey of deepsea nodules is a major project, to be coordinated on an all-India basis.<sup>187</sup> West Germany has agreed to supply equipment, a ship, and provide a soft loan to assist India in this project.<sup>188</sup>

### *Marine Pollution*

A decree was issued approving Kuwait's membership in an international treaty over the right to interfere in case of an accident causing oil pollution on the high seas. The treaty was drawn up in Brussels in November of 1969 and covers the right of member countries to take necessary measures to protect their coasts from

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183. N.Y. Times, Oct. 8, 1981, § 1, at 15, col. 1. The Court of Appeals ruled on a series of suits brought by California, Alaska and the Natural Resources Defense Council.

184. *Id.*

185. *Id.*

186. The Working People's Daily (Ragoon), Apr. 11, 1981, at 4, reprinted in 156 WORLDWIDE REPORTS, LAW OF THE SEA 10 (1981).

187. *Id.* The Minister of State for Science and Technology said the government had decided this. The samples of the nodules were brought up by the country's oceanic research vessel Gaveshani (Researcher). The samples turned up contained manganese, nickel, cobalt and copper.

188. *Id.*

damage that oil pollution might cause.<sup>189</sup>

Delegates from eleven countries in Asia and the Pacific met in Manila to discuss marine pollution in waterways, harbors and ports. This was organized by UNESCO's Intergovernmental Oceanographic Committee on Marine affairs.<sup>190</sup>

#### CONCLUSION

The United States' second thoughts about specific provisions of the Draft Convention place it at odds with a significant portion of the UNCLOS III membership that desires to conclude a treaty in 1982.<sup>191</sup> Accordingly, years of careful negotiations are endangered. A future attitude of conciliation will be essential if the parties are to complete a successful and meaningful treaty. Developments beyond the Conference continue to demonstrate the need for an agreement.

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189. The Arab Weekly (Beirut), Jan. 31, 1981, at 8, *reprinted in* 141 WORLDWIDE REPORTS, LAW OF THE SEA 14 (1981).

190. Daily Express (Philippines), March 5, 1981, at 7, *reprinted in* 141 WORLDWIDE REPORTS, LAW OF THE SEA 7 (1981). This is the second international workshop on marine pollution in two months. The current conference is dubbed the WESTPAC task team. "WESTPAC envisions establishing an International Mussel watch similar to the one organized in the eastern Pacific region, particularly on the seaboard visited by watercraft." Some 106 monitoring stations were organized, measuring the amount of water pollution by observing the nondegradable heavy metals and hydrocarbons absorbed by certain species of shellfish.

191. The United States recently announced it will resume negotiations for the Law of the Sea treaty. A statement by President Reagan, however, warned that the United States is determined to change "unacceptable elements" in the treaty—especially the deep seabed mining provisions. L.A. Times, Jan. 30, 1982, § 1, at 12, col. 4.